SUBJECT INDEX

PAGE

I.

Petitioner's rights could not be lost while awaiting completion of the administrative process 1

II.

The Act of August 12, 1953, demonstrates the national importance of the issues involved in this petition 4

Conclusion 8

TABLE OF AUTHORITIES CITED

CASES — PAGE

A. J. Phillips Co. v. Grand Trunk Western Railway Co., 236 U. S. 662 — 3

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752 — 2

Borer v. Chapman, 119 U. S. 587 — 1

Chew Heong v. United States, 112 U. S. 536 — 7

Inland Dredging Corp., Globe Indemnity Co., In re, 61 F. 2d 765; cert. den., 288 U. S. 611 — 7

Montana-Dakota Utilities Co. v. Federal Power Commission, 335 U. S. 853, 169 F. 2d 392 — 2

State of Minnesota v. Duluth and I. R. R. Co., 97 Fed. 353 — 7

United States v. Louisiana, 123 U. S. 32 — 3

United States F. & G. Co. v. United States, Use of S. W. Co., 209 U. S. 306 — 7

MISCELLANEOUS

99 Congressional Record, p. 9289 — 4, 5

99 Congressional Record, p. 10143 — 6

99 Congressional Record, p. 10144 — 4

99 Congressional Record, p. 10785 — 6

House Report No. 1032 — 4

Senate Bill No. 2220 — 4

STATUTES

Mineral Leasing Act, Sec. 28 (30 U. S. C. 185) — 4

United States Constitution, Art. I, Sec. 10 — 6

United States Constitution, Fifth Amendment — 6

TEXTBOOK

82 Corpus Juris Secundum, p. 994 — 7

IN THE

Supreme Court of the United States

October Term 1953.
No. 193

JOSEPH L. MCCLELLAN, as Trustee in Bankruptcy of the Estate of CAPITAL GAS CORPORATION, a bankrupt corporation, CAPITAL GAS CORPORATION, a corporation, and JOHN WIGHT,

Petitioners,

vs.

MONTANA-DAKOTA UTILITIES CO., a corporation,

Respondent.

Petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

I.

Petitioner's Rights Could Not Be Lost While Awaiting Completion of the Administrative Process.

The principle that the Statute of Limitations will not be allowed "to commence to run against a right until that right has accrued in a shape to be effectually enforced" (*Borer v. Chapman,* 119 U. S. 587, 602) is not disputed by respondent's reply brief.

However, respondent urges that this principle is not applicable to the present case because "the Court could do nothing for petitioner now, which it could not have done at any other time." (Resp. Rep. Br. p. 4.)

Petitioner respectfully asserts to the contrary (Petition, p. 12)—that it had no cause of action until the Federal Power Commission had completed the administrative process of determining that respondent's filed rate was unreasonable. This process took more than seven years, from December 6, 1941, to April 2, 1949, following denial of certiorari by this Court on October 25, 1948, in *Montana-Dakota Utilities Co. v. Federal Power Commission,* 335 U. S. 853, reported below, 169 F. 2d 392.

This dispute is the pivotal one in this case. If the dispute is not resolved in favor of petitioner, it means that every common carrier natural gas pipeline company in the United States can hereafter, without fear of Sherman Act liability, evade its obligations to transport natural gas as a common carrier and obtain an unlawful monopoly on production, transportation and sale.

The Minnesota Statute of Limitations (six years) is much longer than that provided by most states for recovery on a statutory liability. However, even the Minnesota time period was not long enough to save the rights of petitioner if it is the law that its time to sue is running out while it must await the completion of the administrative process.

If petitioner had brought suit before the Federal Power Commission had reached a final decision it would have been properly told that its action was *premature.* (*Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U. S. 752, 767.)

But having awaited a final administrative determination, petitioner is now told that its action was brought *too late!*

Such a holding would be in conflict with *United States v. Louisiana,* 123 U. S. 32, 37, where it was held that a State's action in the United States Court of Claims to recover the proceeds of sales of swamp lands was not barred until the General Land Office had made an official and definite ascertainment of the amount due. This Court did not penalize Louisiana for the delays of the General Land Office, but the Eighth Circuit did penalize the petitioner for the delays of the Federal Power Commission (a delay brought about at least in part by respondent's exhaustion of its own remedies by a petition to this Court).

Respondent attempts to explain the paradox presented by the ruling below by citing at page 4 of its reply brief the decision in *A. J. Phillips Co. v. Grand Trunk Western Railway Co.,* 236 U. S. 662. The claim there was barred, however, because it was not filed on time with the Interstate Commerce Commission as required by the statute governing that particular Commission. In the present case there was no statutory machinery which either permitted or required petitioner to file a claim with the Federal Power Commission while it was waiting for a final decision from that body. Thus the *Phillips* case does not support the judgment of dismissal. On the other hand, the Supreme Court in that action recognized the principle relied on by petitioner (Petition, pp. 15-17) that even though petitioner was not a direct party to the Federal Power Commission proceeding, it was entitled to its benefit. In fact, the decision of the Eighth Circuit in the instant case is in conflict with the holding of this Court in the *Phillips* case.

II.

The Act of August 12, 1953, Demonstrates the National Importance of the Issues Involved in This Petition.

A swift succession of legislative events has followed the filing of the petition herein on July 22, 1953.

Senate Bill 2220, amending Section 28 of the Mineral Leasing Act (30 U. S. C. 185) was passed on July 27, 1953, by the House of Representatives (99 Cong. Record 10144) and after adoption of a conference report (H. Report No. 1032, p. 10635) on July 30, 1953 (p. 10785) the bill was sent to the President and signed on August 12, 1953.

Respondent now urges this Court (Resp. Br. p. 8) to take this new legislation into consideration and to deny this petition on the ground that because of the new law, "there is therefore no public interest whatever in this matter."

It is submitted that the legislative history of the bill should produce an exactly contrary impression on the mind of this Court.

According to Senator Butler, the author of S. 2220:

> "The purpose of the bill is simply to clarify the system of Federal regulation of gas pipelines. Under present law, gas pipelines are subject to Federal regulation from two different sources—from the Department of the Interior and the Federal Power Commission. This bill proposes to repeal certain regulatory authority of the Department of the Interior over gas pipelines crossing public lands so as to leave all Federal regulatory authority over such pipelines in the hands of the Federal Power Commission where it belongs." (99 Cong. Rec. 9289.)

The exact situation of this petitioner was in the mind of the Senate when it passed the measure. The following excerpt from the debate is found at 99 Congressional Record 9289:

> "Mr. Long: Generally speaking, it seems to me that, looking not to the immediate problem but to the long-run problem, *it is better that most of the pipelines should operate as common carriers in order that every producer of gas, whether he be a small independent producer or whether he be a large producer, would have an equal opportunity to transport his gas in interstate commerce,* or to any destination he might choose.
>
> Mr. Anderson: I agree with the Senator from Louisiana. I think that would be desirable, and *that is what we are trying to bring about by means of this proposed legislation."* (Emphasis supplied.)

The House of Representatives adopted a clarifying amendment which was offered by Representative McCormack with the following explanation:

> "Mr. McCormack: * * * The second portion of the proposed amendment relates to producers who are not on public lands and would give the Federal Power Commission authority to direct pipeline companies under Natural Gas Act jurisdiction to accept their gas with due consideration as to whether or not they have the available capacity to do so. *It is designed to protect the small, independent producer from being at the mercy of the pipeline company.* At any particular time, the small, independent producer might not be adversely affected by the lack of transport capacity. If that were the case, however, he simply need not make application to the Federal Power Commission. Although it cannot be said that

there would be an immediate rush to the Power Commission for part of the capacity of existing pipelines, the amendment looks to the future and simply adds a safeguard *in the public interest.*" (Emphasis supplied.) (99 Cong. Rec. 10143.)

However, this amendment was omitted from the final draft of the bill, the following explanation being given:

"Mr. Miller of Nebraska: Mr. Speaker, when the bill was before the House the gentleman from Massachusetts (Mr. McCormack) offered an amendment which was agreed to by the committee. The amendment was taken out in the conference report. *The committee has agreed to study the matter carefully and, if it needs further correction, will take up the suggestions offered by the gentleman from Massachusetts in the next session.*" (Emphasis supplied.) (99 Cong. Rec. 10785.)

In any event it is very doubtful that the repeal of the common carrier provision of the Leasing Act could operate retroactively so as to eliminate the common carrier status of existing (including respondent) common carrier natural gas pipelines who obtained their right-of-ways across public land upon the express statutory condition and also upon the written agreement with the Secretary of the Interior that such lines should be operated and maintained as common carriers. Independent gas producers and the public generally acquired vested rights thereby that cannot be destroyed by such legislative action.

United States Constitution, Fifth Amendment;

United States Constitution, Article I, Section 10.

It is a well recognized constitutional principle that, "In so far as affecting vested rights, a statute will be construed as prospective only."

Chew Heong v. United States, 112 U. S. 536;

U. S. F. & G. Co. v. U. S. use of S. W. Co., 209 U. S. 306, 314;

82 C. J. S. 994.

Congress undoubtedly has the power to change the procedure and require existing common carrier natural gas pipelines to be regulated solely by the Federal Power Commission under the Natural Gas Act and eliminate any other regulation by the Department of the Interior. That would be merely a procedural change that would not affect the substantive rights.

In re Inland Dredging Corp., Globe Indemnity Co. (C. C. A. 2d), 61 F. 2d 765, cert. den., 288 U. S. 611.

It would certainly be contrary to all constitutional concepts if over night the legislature could eliminate the common carrier liability of the natural gas pipelines, thus destroying the public's vested interest in the continuation of that service. For example, the legislature cannot do the reverse, that is, grant a right-of-way to a railroad and then after the railroad has fulfilled the conditions of the grant, the railroad completed, the State then has no power to resume the lands. So held in *State of Minnesota v. Duluth and I. R. R. Co.,* 97 Fed. 353, 359, 360, C. C. Minnesota 1899.

As shown by the above excerpts from the Congressional record, it was the expressed intent to change the procedure

regulating common carrier pipelines, not to change their status. Although respondent urges that the public interest has been chloroformed (Resp. Br. p. 8), petitioner submits that the public interest in the common carrier gas pipeline is still very much alive.

Out of all this recent legislative activity, and contrary to contentions of the respondent, it is respectfully submitted that only one conclusion can be drawn, to-wit, that there presently exists a great public interest, not only in having competition in the sale of gas, but also in the protection of the rights of those producers who desire to ship natural gas over a common carrier gas pipeline under reasonable rates fixed by the Federal Power Commission.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE W. TACKABURY,
Counsel for Petitioners.

MILO V. OLSON,
LEIF ERICKSON,
JOHN J. MCKASY,
Of Counsel.